LIBRARY
SUPREME COURT, U. S.
MOTION FILED MAY 3 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 115

GENERAL MOTORS CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, *et al.*,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF THE ELECTRONIC INDUSTRIES ASSOCIATION.

HARRY G. MASON
1 Summer Avenue
Newark 4, N. J.

WALTER H. BEAMAN
570 Lexington Avenue
New York 22, N. Y.
Attorneys for Amicus Curiae

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
Motion for Leave to File Brief *Amicus Curiae*	1
Brief *Amicus Curiae*	4
The Issue	4
The Argument	5
The Direct Burdens Test	5
The Multiple Burdens Test	6
Due Process Considerations	7
The Need for Clarification by this Court	8
Conclusion	10

CASES CITED.

	PAGE
Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203 (1925)	9
Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147 (1918)	6, 9
Field Enterprises, Inc. v. *Washington*, 352 U. S. 806 (1956); 47 Wash. 2d 852, 289 P. 2d 1010 (1955)	6, 8, 9
Hans Rees Sons, Inc. v. *North Carolina*, 283 U. S. 123	8
International Shoe Co. v. *Fontenot*, 236 La. 279, 107 So. 2d 640 (1959)	9
Miller Bros. Co. v. *Maryland*, 347 U. S. 340 (1954)	7
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U. S. 450 (1959)	5, 6, 9, 10
Norton Co. v. *Department of Revenue of Illinois*, 340 U. S. 534 (1951)	6, 8
Philadelphia & Southern S. S. Co. v. *Pennsylvania*, 122 U. S. 326 (1887)	5, 6
Railway Express Agency, Inc. v. *Virginia*, 358 U. S. 434 (1959)	6
Spector Motor Service, Inc. v. *O'Connor*, 340 U. S. 602 (1951)	5, 9
West Publishing Co. v. *McColgan*, 328 U. S. 823 (1946)	9

STATUTE.

15 U. S. C. §381, *et seq.*	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

GENERAL MOTORS CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, *et al.*,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT OF THE ELECTRONIC INDUSTRIES ASSOCIATION.

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Electronic Industries Association respectfully moves this Court for leave to file the accompanying brief in support of the appeal by General Motors Corporation in the instant case. Counsel for Appellant have stated that they consent to the filing of this brief, but counsel for the Appellee has refused.

The Electronic Industries Association (herein called EIA) has approximately 350 member companies manufacturing electronic devices who transact business throughout the United States. It is the national association representing the fifth largest manufacturing industry in the United States with gross annual sales in excess of $10 billion. The

vast majority of its members represent electronic companies doing business of $25 million a year or less.

Generally, the large members of the Association have their own distribution outlets through subsidiaries and divisions. However, with respect to the smaller members, the situation differs. Many, if not all, of the smaller members have salesmen traveling through many states calling on dealers', distributors' or manufacturers' representatives who, in turn, sell the products of the electronic manufacturer located in other states.

In connection with the sale and distribution of the products of most EIA members it is essential that the manufacturer provide engineering advice and service to the ultimate customer who would be unable to fit the electronic product into his own operation without such advice and assistance.

Under the theory espoused by the Supreme Court of the State of Washington it would appear that the services of the salesman, the manufacturer's representative, and the engineer would permit the imposition of the unapportioned gross receipts tax on any sales made to customers located within Washington or such other states as may have gross receipts taxes or who may hereafter enact such taxes to take advantage of the decision rendered by the Supreme Court of the State of Washington.

The applicant Association has an interest in this case by reason of the substantial effect of the Washington decision, if allowed to stand, upon its member companies, not only with respect to their commerce in that State but in other States as well. Applicant wishes to clarify the presentation of the important constitutional questions presented

by this appeal as they relate to its members, and to show the far-reaching effect of this decision on the interstate commerce of a substantial segment of American industry.

Respectfully submitted,

HARRY G. MASON
1 Summer Avenue
Newark 4, New Jersey

WALTER H. BEAMAN
570 Lexington Avenue
New York 22, New York
Attorneys for *Amicus Curiae*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

GENERAL MOTORS CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, *et al.*,

Appellee.

BRIEF *AMICUS CURIAE* OF ELECTRONIC INDUSTRIES ASSOCIATION.

The Issue.

The issue is whether, consistent with the Commerce Clause, a State may lay upon interstate commerce a tax on the privilege of doing business, measured by the unapportioned gross receipts therefrom; and if so, whether consistent with the Due Process Clause of the XIV Amendment, such an unapportioned gross income tax is valid when applied to interstate sales of goods manufactured in other States and shipped by the manufacturer to customers in the taxing State pursuant to orders received and accepted at an out-of-State office, and not channeled through any place of business in the taxing State.

Argument.

This *amicus curiae* views this case as having in the gross income tax field a nation-wide importance because of its far-reaching consequences, which may not be generally understood.

The Direct Burdens Test.

The tax here is levied on the vendor for the privilege of doing business in Washington. It was measured in this case by gross receipts from interstate sales, all intrastate sales having been separately and fully taxed.

At least since *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 (1887), a state tax on the unapportioned gross receipts from interstate commerce has been viewed as a direct burden on that commerce, amounting to an unconstitutional regulation thereof.

This Court has specifically held that a tax levied on the privilege of engaging in business activities cannot be applied to commerce that is exclusively interstate, even though the measure of the tax is *net* income properly apportioned to substantial activities within the state. *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951). It will be recalled that in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), this Court was careful not to disturb its holding in the *Spector* case. If a franchise or privilege tax measured by properly apportioned *net* income is invalid if applied to purely interstate commerce involving substantial activity within the State, an unapportioned *gross* income tax levied on interstate transactions must *a fortiori* be invalid.

The *Spector* tax was invalid because of its subject (the privilege of engaging in interstate commerce), though its

measure was unobjectionable. The *Philadelphia & Southern* tax was invalid because its measure (gross receipts from interstate comerce) made it equivalent to a burden on and a regulation of interstate commerce. The instant tax, being levied on the privilege of doing interstate business and measured by unapportioned gross receipts therefrom, is bad on both counts.

Thus the Washington Supreme Court, over Commerce Clause objection, has sustained a tax which both by reason of its subject and its measure is not constitutionally applicable to interstate commerce under the principles heretofore developed by this Court. There are no special circumstances to justify the results reached below: the tax is not an apportioned levy "in lieu of" a valid tax on property in the state, cf. *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434 (1959); the orders were not channeled through an instate place of business at which some intrastate commerce was being done, so as to invoke the "vortex" rule of *Norton Co.* v. *Department of Revenue of Illinois*, 340 U. S. 534 (1951); the taxpayer was not participating in the business of its customers by soliciting intrastate orders from their customers, as in the *Northwestern Consolidated Milling Co.* portion of *Cheney Bros. Co.* v. *Massachusetts, supra* at 155; nor was there even the substantial instate place of business whose activity was apparently decisive in *Field Enterprises, Inc.* v. *Washington*, 352 U. S. 806 (1956), *aff'g. per curiam*, 47 Wash. 2d 852, 289 P. 2d 1010 (1955).

The Multiple Burdens Test.

Measured against the "multiple burdens" standard, the tax should also have been held invalid. The Washington Court, in arriving at its conclusion that no double or multiple taxation of the same gross income was possible here, made only one comparison, viz., the tax in Washing-

ton on gross receipts from wholesale selling *vis-a-vis* gross receipts taxes levied elsewhere for the privilege of manufacturing the goods sold. Even on the basis of this comparison there was an actual double burden, since the same unapportioned gross receipts served as the measure of both taxes. It is no answer to this to say, as the Court below did, that the taxes were levied on two different privileges.

But more important is the Washington Court's omission to discuss the obvious and indisputable multiple burden involved if this same tax on the privilege of engaging in the business activities of *wholesale selling* is imposed by other states. If the rationale of the Washington Court's decision were upheld, an identical tax could be levied, without apportionment, on the same gross receipts from this wholesale selling by every State in which any activity connected with such sales might occur. Oregon's right to impose such a tax would be undeniable, since the sales orders were taken and accepted at a place of business there. Other States such as California, Michigan and Missouri had contacts equally substantial, and in fact greater than the State of Washington.

Due Process Considerations.

Due process requires some definite link, some minimum connection, between a state and a person, property or transaction it seeks to tax. *Miller Bros Co.* v. *Maryland*, 347 U. S. 340 (1954). The holding of the Supreme Court of Washington is that an unapportioned tax measured by gross receipts may be exacted from an out-of-state vendor for the privilege of having customers in the state, advising the customers in the conduct of their business and providing national advertising developed and placed without the state. Thus, the Court finds that the having of customers

within the state results in an obligation to the state; yet no protection or benefits are given to the out-of-state vendor by the state merely by reason of the fact that residents of the state purchase its products. It is a violation of due process for a state to tax transactions beyond its borders, or to impose a tax the measure of which does not bear a reasonable relationship to protection and benefits conferred by the state on intrastate activities which give rise to the tax. *Hans Rees Sons, Inc.* v. *North Carolina*, 283 U. S. 123.

The Need for Clarification by this Court.

Whether this tax is judged by the classic legal test of the directness of its burden on (and consequent regulation of) interstate commerce, or by the "practical" or economic test of whether it exposes interstate commerce to multiple burdens which would not be borne if the same commerce were conducted wholly within the borders of one State, it should have been declared invalid as here applied. In upholding its validity, the Washington Court adopted a new construction of the Commerce Clause, and while that construction is unclear, it unquestionably conflicts with the construction which this Court has put on the Commerce Clause in hundreds of carefully considered opinions.

The Washington Court purported to find justification for its position in this Court's *per curiam* affirmance in *Field Enterprises, Inc.* v. *Washington, supra.* In that case this same tax was sustained as applied to interstate selling through a substantial sales office within the State of Washington. There orders were solicited and orders and down payments were received and forwarded to an outstate point at which they were accepted, and from which the goods were shipped. This Court's *per curiam* in that case, citing only *Norton Co.* v. *Department of Revenue, supra,* cannot

be reconciled with the principles laid down in *Spector, supra; Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147 (1918); *Alpha Portland Cement* v. *Massachusetts,* 268 U. S. 203 (1925). Mr. Justice Harlan's clarifying concurring opinion in *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* at 467-468, excludes reconciliation on the basis that the sales office in *Field Enterprises* was engaged to some extent in intrastate commerce.

As a result of this conflict and uncertainty, a situation has developed strikingly similar to that which existed between the time this Court delivered its *per curiam* affirmance in *West Publishing Co.* v. *McColgan,* 328 U. S. 823 (1946) and the explanation of that affirmance in *Northwestern States Portland Cement Co.* v. *Minnesota, supra* (1959). During that period of conflict and uncertainty, state tax administrators pushed their interpretation of the *West Publishing* affirmance to the limits shown in *International Shoe Co.* v. *Fontenot,* 236 La. 279, 107 So. 2d 640 (1959), *cert. denied,* 359 U. S. 984 (1959), from which Congress had to call them back by the passage of Public Law 86-272, 73 Stat. 555 (1959), 15 U. S. C. §381 *et seq.*

The present conflict and uncertainty over the meaning of the *per curiam* in *Field Enterprises* has created the result demonstrated in this case, where we find the State pressing well beyond the fact situation in the *Field* case. The extent of the State's attempted grasp here is highlighted by the fact that, under Public Law 86-272, *supra,* the activities which the Washington Court held sufficient to support this gross income tax would be insufficient as a jurisdictional nexus to sustain a *net* income tax.

If Washington is not restrained in this endeavor, the States of West Virginia and Indiana can be expected to adopt a similar policy in the enforcement of their low-rate gross receipts taxes.

More important, paralleling developments following the *Northwestern States Portland Cement* case, other States can be expected to enact copies of Washington's tax. It should also be borne in mind that this low-rate gross receipts tax is popular with municipalities and if the Washington tax is sustained there is the prospect that additional municipalities will impose such a tax on all deliveries within their jurisdictions.

In these circumstances it is of extreme public importance for this Court to clarify and restate the principles which govern the application, in this area, of gross receipts taxes to interstate commerce.

Conclusion.

It is respectfully submitted that the issues presented by this appeal involve a substantial Federal Constitutional question. This *amicus curiae* therefore urges the Court to note probable jurisdiction.

HARRY G. MASON,
1 Summer Avenue,
Newark 4, N. J.

WALTER H. BEAMAN,
570 Lexington Avenue,
New York 22, N. Y.
Attorneys for *Amicus Curiae.*